Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: February 27, 1997

CASE NO: 95-INA-241

In the Matter of:

POMONA URGENT MEDICAL CARE
Employer,

On Behalf of:

DEVAT U. MAHESHWARI
Alien

Appearance: J. Y. Tu, Esq.
Monterey Park, California
for the Employer and the Alien

Before: Neusner, Holmes, and Huddleston
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien DEVAT U. MAHESHWARI, ("Alien") filed by Employer POMONA URGENT MEDICAL CARE, ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, at San Francisco, denied the application and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who

are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 CFR § 656.27(c).

STATEMENT OF THE CASE

On November 30, 1993, the Employer filed an application for labor certification to enable the Alien, a Pakistan national, to fill the position of medical assistant in a medical clinic located in Pomona, California.

The position offered. Under classification 079.367-010, in the Dictionary of Occupational Titles of the Employment and Training Administration of the U. S. Department of Labor Dictionary,[1] a medical assistant:

> Performs following duties under direction of PHYSICIAN (medical ser.) in examination and treatment of patients: Prepares treatment rooms for examination of patient. Drapes patients with covering and positions instruments and equipment. Hands instruments and materials to doctor as directed. Sterilizes and cleans instruments. Prepares inventory of supplies to determine items to be replenished. Interviews patients and checks pulse, temperature, blood pressure, weight, and height. May operate equipment, give injections or treatments, and assist in laboratory. May schedule appointments, receive money for bills, keep X-ray and other medical records, perform secretarial tasks, complete insurance forms, and maintain financial records.

The Employer described the position it offered as follows:

> MEDICAL ASSISTANT, (BILINGUAL): Take and record patient's temperature and blood pressure. Write history of patient's

[1]Hereinafter, the Dictionary of Occupational Titles of the Employment and Training Administration of the U. S. Department of Labor will be mentioned as "the Dictionary."

> illness. Answer telephone. Schedule appointments. Record treatment information. Fill out insurance forms. Keep patient's records. Sterilize and clean instruments. Prepare inventory of supplies to determine items to be replenished. Handle correspondence. Must speak Hindi. 2 years experience or 2 years as medical doctor. $1,800 per month/40 hours per week. Job site/interview: Pomona. Contact: Steve Vuckovich, Doctor.

AF 68.

Defects noted.[2] By his May 27, 1994, Notice of Findings the CO indicated the application would be denied unless the defects noted were either amended or successfully rebutted: (1) an unduly restrictive related experience requirement, and (2) an unduly restrictive foreign language requirement. AF 50-54.

Under 20 CFR § 656.21(b)(2) the Employer must establish the business necessity for any requirement where it cannot document that the qualification criterion is normal for the occupation, or that the requirement is included in the Dictionary, or there such requirements are for a language other than English, involve a combination of duties, or limit the job to workers willing to live on Employer's premises. This regulation proscribes the use of unduly restrictive job requirements in the recruitment process as a practice that impairs the operation of the Act in that it limits the number of U.S. workers who may consider themselves qualified to apply for an advertised job opportunity. **Venture International Associates, Ltd.**, 87-INA-569 (Jan. 13, 1989)(en banc). Alternative job qualifications are not unduly restrictive where the primary criteria are entirely straight forward and not unduly restrictive, and where a careful reading of the employer's proposal shows that its provisions for related experience operate to expand rather than to restrict the size of the class of U. S. workers who can be considered to be prospective applicants for the advertised position. **Systems International, Inc.**, 92-INA-60(Aug. 24, 1993); **Henry L. Malloy,** 93-INA-355(Oct. 5, 1994).

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[2]The Notice of Findings (NOF) must state the specific grounds for denial of certification by identifying the section or subsection violated, the nature of the violation, and the evidence supporting the finding. In addition, it must give instructions for rebutting or curing the violation. If the NOF does not specify what the employer must show to rebut or cure, the employer is deprived of a full opportunity to rebut. **Peter Hsieh**, 88-INA-540 (Nov. 30, 1989); **Downey Orthopedic Medical Group,** 87-INA-674(Mar. 16, 1988)(en banc). If the NOF is unclear or ambiguous, or causes or contributes to employer's confusion, the application may be remanded to the CO for clarification and to give employer an opportunity to rebut. **Patisserie Suisse, Inc.**, 90-INA-131(Oct. 16, 1991); **Poultry Classics,** 91-INA-68(June 21, 1991); **Toys "R" Us,** 89-INA-345(Dec. 10, 1990) **Sue Chaing,** 89-INA- 77(May 25, 1990); American Candy Mfg Co., 88-INA-274(Oct. 27, 1989); **Hudson Tool & Die Co.**, 88-INA-145(Oct.4, 1989); **Dr. Joseph Maghen**, 88-INA-335(Aug.8, 1989).

Language requirement. The CO found Employer's requirement of Hindi to be an unduly restrictive employment qualification. In arguing its business necessity of this foreign language requirement, Employer's brief addressed the proportion of the patients who spoke Hindi, explaining that the one hundred and seven names listed in AF 40-44 were former patients of Dr. A. S. Shekhon, Employer's predecessor in the practice, who was "a renowned physician in the Hindi-speaking community." Employer argued, "In order to keep our service in the Hindi-speaking community and to better serve the Hindi-patients, a Hindi-speaking medical assistant is absolutely necessary because none of our current staff speaks Hindi." AF 36-37. The Employer added that it was a practical necessity for the maintenance and expansion of this medical practice to have a Hindi-speaking medical assistant, who would be expected to use the foreign language sixty percent of the time on the job. AF 38.

> It would be completely unrealistic to employ a person who was not able to maintain the continuous communication with our Hindi-speaking customers. Indeed, we will not employ a person who is unable to speak Hindi as he/she would be unable to perform the function to the level that the instant position demands. It will greatly impede the efficiency of our office administration and our business will be greatly undermined if the person in the position offered cannot speak Hindi.

AF 39. The Employer's statement offered to explain (1) how the required foreign language will be used in the job duties;[3] (2) how the work assigned by the Employer was completed in the past with the foreign language; (3) that the absence of the foreign language capacity will have an adverse impact on the Employer's business; and (4) the percentage of Employer's business that is dependent on the use of the foreign language.[4]

Employer's rebuttal documentation contended that the use of Hindi is a business necessity because it is not based on personal preference of the Employer. Giving weight to the nature of the medical services Employer offers, as discussed hereinabove, its capacity to continue the practice of Dr. Shekhon would require that the Employer further establish that the presence in the office of a Hindi speaking individual to be available to assist the Employer's non-Hindi speaking physicians in providing medical care for Hindi speaking patients is necessary. The CO concluded

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[3]I.e., Employer did not say what must be explained and why it cannot be explained in English.

[4]Noting a few Hispanic names on the Employer's employee roster suggested the need to use other foreign language personnel in this medical office, which is located in Southern California.

in the Final Determination, however, that the Employer failed to document how the duties of the medical assistant were performed prior to its petition for the Alien, since none of its current staff have Hindi language capability, and the Employer's business has not been undermined by the absence of a Hindi-speaking medical assistant. Moreover, the Employer had submitted the list of patient names and addresses but did not offer to substantiate that any of the patients are unable or unwilling to communicate in the English language. AF 33-34, **Information Industries, Inc.,** 88-INA-82 (Feb. 9, 1989), citing **Acupuncture Center of Washington v. Dunlop,** 543 F2d 852, 858 (D.C. Cir., 1976). In its discussion in **Information Industries, Inc.,** this Board agreed that,

> An employer has the discretion, within reason, to obtain certification for any job whose requirement are directly related to its business, and does not have to establish dire financial consequences if the job is not filled or is filled by a U. S. worker who is not fully qualified.

As it is obvious that the ordinary work of a medical assistant does not require fluency in a foreign language, the Employer is required to show how the work it proposes to assign to the medical assistant was completed in the past without having a Hindi speaking Employee on its staff. In this case, the Employer failed to submit such evidence to the CO before the Final Determination was issued. Afterward, however, the Employer attached to its brief several statements of patients as to the necessity that it have a Hindi speaking person working at the office. As these statements were never placed before the CO, they cannot be considered in this appeal.[5] AF 20-29. Similarly, until the Employer filed this appeal it neither suggested nor documented its contention that the former owner of Pomona Urgent Medical Care, Dr. Shekhon, spoke Hindi to his patients. The Employer stated, however, that approximately thirty percent of the patients of the facility spoke Hindi, and that some of those patients speak no English at all. AF 05-06. This indicates that the number of patients who cannot communicate with the Employer's staff in English is materially smaller than thirty percent.

The Employer argued in its brief that, if a significant number of clients are of a particular ethnic background, there is no need to document that the Hindi speaking patients comprise any particular percentage of the Employer's business. **Matter of Raul Garcia, M.D.,** 89-INA-211 (February 4, 1991). In the instant case, however, the Employer offered evidence of neither the

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[5]If this claim were remanded, the CO would have an opportunity to review the statements as new evidence, since they did not exist until after this matter was decided by the CO. **Cappricio's Restaurant**, 90-INA-480(Jan. 7, 1992); **Kelper International Corp.**, 90-INA-191(May 20, 1991); **Kogan & Moore Architects, Inc.**, 90-INA-466(May 10, 1991).

number nor the proportion of Employer's patients who either speak Hindi exclusively or for whom Hindi is the language of preference in medical consultations. The Employer argued that it wished to maintain and expand its position in an existing market consisting of patients for whom Hindi is the language of choice and/or necessity. Again, the Employer did not establish that it would, in fact, suffer financial damage by denial of this application nor did it demonstrate the methods by which it proposed to enlarge its share of this market for the medical services it provides. Id. For these reasons, it is concluded that Employer has failed to sustain its burden of proving the business necessity of a medical assistant who speaks Hindi, even though it did demonstrate that such an employee would be preferable and convenient for the reasons suggested in its brief. In view of this finding, it is not necessary to address any issue concerning alternate experience implied in the CO's denial of certification.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: **Pomona Urgent Medical Care**
(Devat U. Mehashwari)

Case No. : 95-INA-241

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: ~~December 13, 1996~~
February 18, 1997